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Ozark Mountain Electric and International Brotherhood of Electrical Workers, Local Union No. 453, affiliated with the International Brotherhood of Electrical Workers. Case 17-CA-19094

September 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

Upon a charge filed by the Union on March 31, 1997, the General Counsel of the National Labor Relations Board issued a complaint on June 11, 1997, against Ozark Mountain Electric, the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On August 21, 1997, the General Counsel filed a Motion for Summary Judgment with the Board. On August 25, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated August 5, 1997, notified the Respondent that unless an answer were received by August 13, 1997, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, with a business office at Route 1, Box 265-90, Strafford, Missouri, has been engaged in business as an electrical contractor in the construction industry. During the 12-

month period ending May 31, 1997, the Respondent, in conducting its business operations, provided services valued in excess of \$50,000 to Unified Construction Company (Unified) at jobsites located within the State of Missouri. At all material times, Unified, with a business office located at 2569 North Barnes, Springfield, Missouri, has been engaged in business as a general contractor in the construction industry. During the 12-month period ending May 31, 1997, Unified, in conducting its business operations, performed services valued in excess of \$50,000 in States other than the State of Missouri and purchased and received at various locations in Missouri, goods valued in excess of \$50,000 directly from points outside the State of Missouri.

The Respondent, by the acts set forth below, authorized the National Electrical Contractors Association, Springfield Division-Kansas City Chapter (NECA) to act as its collective-bargaining representative for the period of November 16, 1996, through August 31, 1997. At all material times, NECA has been a multi-employer organization, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations including the Union. Annually, employer members of NECA with business operations in the State of Missouri, collectively perform services valued in excess of \$50,000 in States other than the State of Missouri, and collectively purchase and receive at various locations in Missouri, goods valued in excess of \$50,000 directly from points outside the State of Missouri. We find that the Respondent, Unified, and NECA have each been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About February 17, 1997, the Respondent laid off its employee Charlie McCarthy because he joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen wiremen, foremen, general foremen and apprentices employed by the Respondent, to perform electrical work in the geographical jurisdiction of the Union, including the following counties in Missouri: Christian, Dallas, Douglas, Greene, Hickory, Howell, Laclede, Oregon, Ozark, Polk, Pulaski, Shannon, Stone, Taney, Texas, Webster and Wright but EXCLUDING office

clerical employees, professional employees, guards, and supervisors as defined in the Act.

About November 16, 1996, the Respondent entered into a Letter of Assent-A whereby it authorized NECA as its collective-bargaining representative for all matters contained in or pertaining to the current or any subsequent approved inside wiremen labor agreement between NECA and the Union, and agreed to be bound by all provisions contained in the current and subsequent agreements between NECA and the Union. About the same date, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit by signing the Letter of Assent-A without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. For the period from November 16, 1996, through August 31, 1997, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

At all material times, NECA and the Union have been parties to an inside wiremen labor agreement, effective from September 1, 1994, through August 31, 1997 (the 1994-1997 agreement). Since about January 20, 1997, the Respondent has repudiated this agreement by, inter alia, failing to utilize the contractual hiring procedure, failing to pay contractual benefits to unit employees, failing to accept and process grievances in accordance with the contractual grievance procedure, and by discharging or laying off a unit employee.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By laying off employee Charlie McCarthy, the Respondent has also been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

By repudiating the 1994-1997 agreement, the Respondent has also been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d), and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by laying off Charlie McCarthy, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful layoff, and to notify the discriminatee in writing that this has been done.

Furthermore, having found that the Respondent has violated Section 8(a)(5) and (1) by repudiating the 1994-1997 agreement, by, inter alia, failing to utilize the contractual hiring procedure,¹ failing to pay contractual benefits to unit employees, failing to accept and process grievances in accordance with the contract, and by discharging or laying off a unit employee,² we shall order the Respondent to comply with these terms and conditions of the 1994-1997 collective-bargaining agreement with the Union for the period from November 16, 1996, through August 31, 1997, and to make whole its unit employees for its failure to comply with these terms and conditions of the 1994-1997 agreement for the period from about January 20 through August 31, 1997. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970),

¹ Although the charge specifically contends there is a "hiring hall procedure" in the collective-bargaining agreement, the complaint does not allege that the "contractual hiring procedure" is a hiring hall agreement. In the event that the "contractual hiring procedure" is a hiring hall agreement, the Respondent shall be required to offer reinstatement to and make whole those applicants who would have been referred to the Respondent were it not for the Respondent's failure to abide by the agreement. *J.E. Brown Electric*, 315 NLRB 620 (1994). In view of the uncertainty as to whether there is a hiring hall agreement, and in this precompliance stage, Member Higgins does not pass on whether he agrees with the majority view in *J.E. Brown*.

² In the event that the unit employee discharged or laid off is someone other than Charlie McCarthy, the Respondent shall offer that person full reinstatement to his or her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed, and to make him or her whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Ozark Mountain Electric, Strafford, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off its employees because they join or assist the Union or engage in concerted activities, or to discourage employees from engaging in these activities.

(b) Repudiating the collective-bargaining agreement between the National Electrical Contractors Association, Springfield Division-Kansas City Chapter, and International Brotherhood of Electrical Workers Local Union 453, affiliated with the International Brotherhood of Electrical Workers, effective from September 1, 1994, through August 31, 1997, for the following unit employees by, inter alia, failing to utilize the contractual hiring procedure, failing to pay contractual benefits to unit employees, failing to accept and process grievances in accordance with the contractual grievance procedure, and by discharging or laying off a unit employee:

All journeymen wiremen, foremen, general foremen and apprentices employed by the Respondent, to perform electrical work in the geographical jurisdiction of the Union, including the following counties in Missouri: Christian, Dallas, Douglas, Greene, Hickory, Howell, Laclede, Oregon, Ozark, Polk, Pulski, Shannon, Stone, Taney, Texas, Webster and Wright but EXCLUDING office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Charlie McCarthy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Charlie McCarthy whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, expunge from its files any and all references to the unlawful layoff and, within 3 days thereafter, notify Charlie McCarthy in writing that this has been done.

(d) Comply with the terms and conditions of the 1994-1997 collective-bargaining agreement with the Union, for the period from November 16, 1996,

through August 31, 1997, including, inter alia, those provisions concerning the contractual hiring procedure, contractual benefits, and grievances, make whole its unit employees for its failure to comply with these terms and conditions for the period from about January 20 to August 31, 1997, as set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Strafford, Missouri, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 31, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off our employees because they join or assist the International Brotherhood of Electrical Workers Local Union 453, affiliated with the International Brotherhood of Electrical Workers or engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT repudiate the collective-bargaining agreement between the National Electrical Contractors Association, Springfield Division-Kansas City Chapter and International Brotherhood of Electrical Workers Local Union 453, affiliated with the International Brotherhood of Electrical Workers, effective from September 1, 1994, through August 31, 1997, for the following unit employees by, inter alia, failing to utilize the contractual hiring procedure, failing to pay contractual benefits to unit employees, failing to accept and process grievances in accordance with the contractual grievance procedure, or by discharging or laying off a unit employee:

All journeymen wiremen, foremen, general foremen and apprentices employed by us, to perform electrical work in the geographical jurisdiction of the Union, including the following counties in Missouri: Christian, Dallas, Douglas, Greene, Hickory, Howell, Laclede, Oregon, Ozark, Polk,

Pulski, Shannon, Stone, Taney, Texas, Webster and Wright but EXCLUDING office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Charlie McCarthy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Charlie McCarthy whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in a decision of the National Labor Relations Board.

WE WILL, within 14 days from the date of this Order, expunge from our files any and all references to the unlawful layoff and, within 3 days thereafter, notify Charlie McCarthy in writing that this has been done.

WE WILL comply with the terms and conditions of the 1994–1997 collective-bargaining agreement with the Union, for the period from November 16, 1996, through August 31, 1997, including, inter alia, those provisions concerning the contractual hiring procedure, contractual benefits, and grievances, and WE WILL make whole our unit employees for our failure to comply with these terms and conditions for the period from about January 20 through August 31, 1997.

OZARK MOUNTAIN ELECTRIC